



Matthew G. Bevin  
Governor

COMMONWEALTH OF KENTUCKY

**MEMORANDUM**

TO: Greg Thomas  
Acting Secretary

FROM: Paul Looney  
Assistant State Highway Engineer  
Dept. of Highways

and

William H. Fogle  
Office of Legal Services

DATE: April 11, 2016

SUBJECT: Brannon Road Project – **ATTORNEY CLIENT PRIVILEGED  
COMMUNICATION**

You have asked for a memorandum setting forth the events that led up to the cancellation of the above referenced project. Stated simply, the project was delayed primarily because a single property owner has asserted a legal challenge to the Cabinet's authority to acquire the property through eminent domain. The particulars surrounding this legal challenge will be set forth below.

Remainder of document redacted pursuant to attorney-client privilege because it contains legal strategy and evaluation.

## **Shipp, Todd T (KYTC)**

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**From:** Siwula, Jason J (KYTC)  
**Sent:** Thursday, February 11, 2016 2:31 PM  
**To:** Looney, Paul C (KYTC)  
**Subject:** FW: 15-1086

<b>Tracking:</b>	<b>Recipient</b>	<b>Read</b>
	Looney, Paul C (KYTC)	Read: 2/11/2016 2:49 PM

Please see information below from the Office of Legal Services.

-Jason

**From:** Moore, Kevin (KYTC)  
**Sent:** Thursday, February 11, 2016 1:32 PM  
**To:** Siwula, Jason (KYTC) <Jason.Siwula@ky.gov>  
**Subject:** FW: 15-1086

Jason,

Please see the review below. I know you wanted a quick turnaround. I tend to agree. It appears that the Cabinet could cancel the contract however there would likely be an amount to pay the contractor for costs incurred. If there are substantial budget issues then the contract does allow for same if we can show road funds being insufficient. Let me know if you want to discuss further.

Thanks,  
Kevin

*Kevin Moore, Esq.*  
General Counsel  
Kentucky Transportation Cabinet  
Office of Legal Services  
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**From:** Shipp, Todd (KYTC)  
**Sent:** Thursday, February 11, 2016 12:11 PM  
**To:** Moore, Kevin (KYTC) <Kevin.Moore@ky.gov>  
**Subject:** RE: 15-1086

Kevin:

The project is one that should have never been let much less executed contracts on and a Notice to Proceed issued. There is no way the deadline of March 16 will be met for right of way clearance and utility clearance. I have reviewed the specifications and there is no real simple way to get out of this without some potential loss. The first and cleanest way to get out of this contract is to use the last clause of the actual contract the parties executed. It specifically states that the contract is subject to there being sufficient and adequate road funds available under the contract for the payment of invoices as they come due. The clause specifically waives any right to any and all damages as a result.

Second, the Cabinet does not have within its contracts a "termination for convenience" clause. KRS 45A.200 mandates all Finance let projects exceeding \$50,000 have a clause for this in the body of the contract. All other let contracts (KYTC) it is an optional clause. Even if it were in the specifications/contract, I am not totally sure we could meet the standard of good faith and fair dealing on this cancellation.

Third, one other option available would be to suspend the work and contract under specification 108.08. it allows for a suspension of the work until such time as determined to be appropriate for the convenience of the Commonwealth. Any step we take will most likely require a payment of any sums the contractor has expended for the preparation to work on the project.

**From:** Siwula, Jason (KYTC)

**Sent:** Wednesday, February 10, 2016 10:47 AM

**To:** Moore, Kevin (KYTC) <[Kevin.Moore@ky.gov](mailto:Kevin.Moore@ky.gov)>

**Cc:** Looney, Paul (KYTC) <[Paul.Looney@ky.gov](mailto:Paul.Looney@ky.gov)>

**Subject:** 15-1086

Kevin,

Please see attached items pertaining to the subject contract. As discussed, the Cabinet is seeking the best path forward given that there are unforeseen Right-of-Way challenges on this project and, as an input to that decision making, is seeking to understand impacts relating to possible cancellation of this contract. The summary information that you requested is in the attached word document.

The full proposal can be viewed at <http://transportation.ky.gov/Construction-Procurement/Proposals/326-JESSAMINE-15-1086.pdf>. There are three addendums also if you need to see those they can be found toward the bottom of the page <http://transportation.ky.gov/Construction-Procurement/Pages/proposals.aspx?letting=11/20/2015>.

There is a Pre-Construction meeting currently scheduled between the Cabinet and the contractor for next week so a quick turnaround is appreciated.

Thank you for your assistance. If you have any questions please let me know.

*Jason J. Siwula, P.E.*

Innovation Engineer

Kentucky Transportation Cabinet

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